STATE OF MICHIGAN

MICHIGAN SUPREME COURT

J & J FARMER LEASING, INC., FARMER BROTHERS TRUCKING CO., INC., CALVIN ORANGE RICKARD, JR., and JAMES W. RILEY, as Personal Representative of the ESTATE OF SHARYN ANN RILEY, Deceased,

Plaintiffs-Appellees,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

_____/

Supreme Court No. 125818
Court of Appeals No. 239069
L.C. No. 96-3742- NO

BRIEF OF AMICUS CURIAE MICHIGAN DEFENSE TRIAL COUNSEL

MAURICE A. BORDEN (P34603)
Attorney for Amicus Curiae
Michigan Defense Trial Counsel
12935 South West Bay Shore Drive
Traverse City, MI 49684
(231) 946-1140

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STATEMENT OF THE QUESTION PRESENTED

MUST AN EXCESS JUDGMENT AGAINST THE INSURED REMAIN ENFORCEABLE IN ORDER FOR A SUIT BY THE ASSIGNEE OF A BAD FAITH FAILURE TO SETTLE CLAIM TO PROCEED?

Defendant-appellant Citizens answers: "Yes."

Plaintiffs-appellees answer: "No."

The trial court answers: "No."

The Court of Appeals answers: "No."

Amicus Curiae Michigan Defense Trial Counsel answers: "Yes."

STATEMENT OF FACTS

Amicus Curiae Defense Trial Counsel adopts the statement of facts set forth in defendant-appellant Citizens Insurance Company of America's application for leave to appeal.

STANDARD OF REVIEW

The trial court's order denying Citizens Insurance Company of America's summary disposition motion is reviewed *de novo*. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1987).

ARGUMENT

I. UNDER THE RATIONALE FOR THIS COURT'S DECISION IN *KEELEY*, A SUIT FILED BY THE ASSIGNEE OF A BAD FAITH FAILURE TO SETTLE CLAIM MAY PROCEED SO LONG AS THE EXCESS JUDGMENT AGAINST THE INSURED REMAINS ENFORCEABLE

A. THE RATIONALE FOR THE LIMITATION IN *KEELEY* THAT AN INSURER SHOULD NOT BE REQUIRED TO PAY MORE THAN THE INSURED WOULD BE ABLE TO PAY IS THAT AN ACTION FOR BAD FAITH FAILURE TO SETTLE SOUNDS IN CONTRACT AND CONTRACT DAMAGES ARE INTENDED TO COMPENSATE FOR ECONOMIC LOSS SUFFERED BY THE INSURED

In *Frankenmuth Mut Ins Co v Keeley*, 436 Mich 372, 376; 461 NW2d 666 (1990), this Court adopted Justice Levin's dissent in *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525, 546; 447 NW2d 691 (1989). Justice Levin fashioned the following compromise remedy, utilizing elements from the prepayment rule and judgment rule, where an insurer's breach of duty to settle results in an excess judgment against its insured:

> We thus propose a compromise between the prepayment and the judgment rule: that this Court accept the essence of the judgment rule by eliminating the need to show partial payment, but provide protection for insurers along the lines of the prepayment rule by precluding collection on the judgment from the insurer beyond what is or would actually be collectable from the insured. 433 Mich at 565.

The requirement under the prepayment rule that the insured pay part or all of an excess judgment as a prerequisite to bringing suit against an insurer for bad faith failure to settle was rejected by Justice Levin because of the financial hardship placed on insureds. 433 Mich at 553-554. The compromise rule devised by Justice Levin and adopted by this Court incorporated the limitation inherent in the prepayment rule, *i.e.*, that an insurer should not be required to pay more than the insured is able to pay on an excess judgment. Id. at 554. The reason that this element of

the prepayment rule was incorporated through Justice Levin's compromise rule is that a cause of action for bad faith failure to settle is a breach of contract claim. Id. at 556-557. Contract damages are based on the injured party's expectation interest. Contract damages are designed to compensate the injured party for economic loss suffered as a result of the breach of contract. The purpose of contract damages is to place the injured party in the same economic position that he or she would have held had the contract not been breached. Id. at 557, 560.

In light of the nature of contract damages, Justice Levin fashioned a remedy or rule which precludes collection on the excess judgment from the insurer beyond the economic loss actually suffered by the insured.

B. THE COMPROMISE REMEDY FASHIONED BY THIS COURT IN *KEELEY* CONTEMPLATES THAT THE EXCESS JUDGMENT AGAINST THE INSURED REMAIN IN EFFECT UNTIL IT HAS BEEN DISCHARGED BY PAYMENT

In fashioning the compromise remedy, Justice Levin's opinion proposed the following relief in *Keeley:*

> We would accept the judgment rule insofar as it dispenses with the need to establish that Keeley paid any amount on the judgment and would, as did the Court of Appeals, remand to the trial court for a determination of the extent of Keeley's assets not exempt from legal process and, additionally, for a determination of the value of the excess portion of the judgment--now over $600,000 including accrued interest plus additional interest as it accrues--taking into account not only Keeley's assets not exempt from legal process but also his prospects of attaining in the future additional assets from which the judgment could be collected. 433 Mich at 563-565.

Justice Levin more fully explained application of the compromise remedy in footnote 28 of his opinion as follows:

> The court should, in determining Keeley's prospects of attaining in the future additional assets, consider his educational achievement and plans for future education, his skills, present and prospective, and the job

opportunities that might be available to him.

> I would prefer to direct entry of a judgment declaring that Frankenmuth is *subject to liability* (not that it is liable) for the $600,000 excess plus interest as it accrues, but would not require Frankenmuth to pay any amount in respect to that judgment unless and until and then only to the extent Boone can establish that Keeley is collectable.
>
> As and when Keeley acquires assets, greater income, inheritance, whatever, Boone could seek a declaration requiring Frankenmuth to pay an amount equivalent thereto. The judgment against Frankenmuth would substitute for the judgment against Keeley, so that Keeley's credit would no longer be adversely affected. The burden thus imposed on Boone, the injured person, would be no greater than in any case where there is inadequate insurance-- he could only recover to the extent he could find attachable or garnishable assets.
>
> Boone would be better off because he need not actually attach or garnish, and there should be a minimum of judicial proceedings. Such a judgment should not be subject to any statute of limitations. There would be no possibility of bankruptcy discharge of Keeley's debt. Id. at 565 fn 28. (Emphasis original.)

Under the compromise remedy set forth in Justice Levin's opinion and adopted by this Court, where an insurer has been found liable for breach of its contractual duty to settle, a judgment may be entered declaring that the insurer is subject to liability, as opposed to a declaration that the insurer is liable, for the amount of excess judgment, together with interest as it accrues. The judgment would not require the insurer to pay any amount of the excess judgment unless and until and then only to the extent that it is established that the insured is collectable. Under the compromise rule adopted by this Court, economic loss caused by an insurer's breach of duty to settle is not limited to the amount of the insured's assets not exempt from legal process at the time the excess judgment against the insured is entered. As the insured acquires additional assets, greater income, inheritance, or other funds, the insurer is required to pay additional amounts equivalent to the additional assets acquired by the insured. The compromise remedy

articulated by Justice Levin contemplates that the judgment against the insurer would substitute for the excess judgment against the insured, so that the insured's credit will no longer be adversely affected.

While Justice Levin's opinion would not limit the recovery against an insurer liable for breach of duty to settle to an amount equal to the insured's net assets which are not exempt from legal process, Justice Levin agreed with the following procedure suggested by Judge Keeton for determining the amount of economic loss suffered by the insured and satisfying the excess judgment:

> "The appropriate measure of damages, when an insured is entitled to a recovery that is in excess of the applicable liability insurance policy limits, should be the amount needed to make the insured whole by placing the insured in the same position that would have existed had there been no breach of the duty to settle. Furthermore, this sum should be established after taking into account the amount, if any, that the third party claimant could have realized upon rights against the insured if there had been no cause of action for liability in excess of policy limits--that is, after taking into account how much could have been recovered above the insurance policy limits against an insured who had some assets, but not enough that the third party could recover more than could have been recovered against the insured. *This might be done by permitting a single recovery against the insurer on the excess liability claim, at the instance of either the insured or the third party claimant, in an amount equal to the insured's net assets which are not exempt from legal process, and holding that the claimant's tort judgment against the insured is fully discharged by payment of this sum to the claimant either by the insured or by the insurer on the insured's behalf.* Although in some instances this amount may be somewhat more than the net recovery the claimant would otherwise have realized (apart from the excess liability claim) *this approach* certainly more closely approximates that recovery and it *provides full protection of the insured's financial position from the consequences of the insurer's wrong to the insured in failing to settle.*" Id. at 563-565 fn 27, quoting, Keeton & Widiss, Insurance Law, § 7.8(i)(4), pp 903-905. (Emphasis original.)

From the foregoing, it is clear that the compromise remedy proposed by Justice Levin and adopted by this Court in *Keeley*, contemplates that the excess judgment against the insured

remain in effect until it has been discharged by payment. Absent an enforceable judgment against the insured, the insured cannot suffer economic loss. Recovery under the compromise rule in *Keeley* is limited to "what is or would actually be collectable from the insured." 433 Mich at 565.

A cause of action against an insurer for bad faith failure to settle is a contractual cause of action belonging to the insured, a party to the insurance contract. Because an injured party is not a party to the contract, the injured party has no cause of action where an insurer breaches its duty owed to its insured to settle. *Lisiewski v Countrywide Ins Co,* 75 Mich 631, 637; 255 NW2d 714 (1977). Subject to the restrictions which apply to assignments in general, an insured may assign his or her cause of action against an insurer for breach of duty to settle to an injured claimant. See, *Kingston v Markward & Karafilis, Inc*, 134 Mich App 164, 171-172; 350 NW2d 842 (1984), quoting 3 Restatement Contracts, 2d § 317(2), regarding assignments in general. The assignee takes whatever rights and is entitled to whatever remedies and damages that the insured had the time of the assignment. The assignee's rights are no greater than those of the assignor. *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004).

The economic loss to an insured caused by an insurer's breach of duty to settle is not measured at the time the excess judgment is entered. While Justice Levin recognized that damage credit and financial ruin are economic loss and compensable, the insured must demonstrate that his credit has been damaged or that he has suffered financial ruin. In *Keeley*, no such evidence was proffered. 433 Mich at 559-560. Moreover, under the compromise rule formulated by Justice Levin, the insured's economic loss is not limited to the amount of the insured's assets not exempt from legal process at the time the excess judgment is entered. The compromise remedy allows for the collection of future economic loss. A judgment declaring that

an insurer liable for breach of duty to settle is subject to liability for an excess judgment is not subject to any statute of limitations. As the insured acquires additional assets, the insured, or the claimant with an assignment, can seek a declaration requiring the insurer to pay additional amounts to satisfy the excess judgment. Under Justice Levin's compromise remedy, the judgment against the insured must remain enforceable in order for the insured to suffer additional economic loss as income, inheritance, lottery winnings and other assets are acquired.

Conversely, when an excess judgment becomes unenforceable, *e.g.,* through discharge in bankruptcy or due to release or satisfaction, the insured cannot sustain any further economic loss. Where there is no possibility for further economic loss, it becomes impossible for any additional contract damages for breach of duty to settle to accrue. Therefore, the judgment against the insured must remain enforceable in order for an action by an assignee of a breach of bad faith failure to settle claim to proceed.

The compromise remedy formulated by Justice Levin and adopted by this Court relieves the insured of the obligation to pay part or all of the excess judgment as a prerequisite to recovery against an insurer for breach of contractual duty to settle. As explained by Justice Levin and Judge Keeton, the financial interest of both the insured and the third-party claimant are served by the compromise rule adopted by this Court. Under the compromise rule, there is no possibility of bankruptcy to discharge the insured's debt for the excess judgment. In addition, the insured, or the injured party/assignee has an opportunity to recover against the insurer for additional economic loss sustained by the insured as it accrues. Finally, the compromise rule adopted by this Court in *Keeley*, including the requirement that the excess judgment remain enforceable in order to collect from an insurer liable for breach of duty to settle, is fully consistent with Michigan law governing contract damages.

The Court of Appeals' decision in *Sederholm v Michigan Mut Ins Co*, 142 Mich App 372; 370 NW2d 357 (1985), was decided before and without the benefit of this Court's opinion in *Keeley* on rehearing. The *Sederholm* opinion is inconsistent with and fails to follow the economic loss analysis set forth in Justice Levin's opinion and Michigan law governing contract damages. Further, the *Sederholm* opinion is contrary to the compromise rule set forth by Justice Levin and adopted by this Court in *Keeley*. 142 Mich App at 368.

RELIEF REQUESTED

Amicus Curiae Michigan Defense Trial Counsel respectfully request that this Honorable Court peremptorily reverse the Court of Appeals' decision, and remand the case to the trial court for entry of summary disposition in favor of Citizens Insurance Company of America. Alternatively, Amicus Curiae Michigan Defense Trial Counsel request that this Honorable Court grant Citizens Insurance Company of America's application for leave to appeal.

Respectfully submitted,

Date: March 2, 2005

By: _____

MAURICE A. BORDEN (P34603)
Attorney for Amicus Curiae
Michigan Defense Trial Counsel
12935 South West Bay Shore Drive
Traverse City, MI 49684
(231) 946-1140